

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CWP No. 2402 of 2007
Date of decision 8. 10 .2007

H.M.T.Limited .. Petitioner

Versus

Central Board of Direct Taxes, North Block New Delhi and others
.. Respondents

CORAM: HON'BLE MR. JUSTICE M.M. KUMAR
HON'BLE MR. JUSTICE AJAY KUMAR MITTAL

PRESENT: Mr.Pankaj Jain, Advocate for the petitioner
Mr.Yogesh Putney, Advocate for the Revenue .

M.M.Kumar, J.

The petitioner which is a public sector undertaking has filed the instant petition under Article 226 of the Constitution with a prayer for quashing order dated 20.11.2006 (Annexure P.1 Colly) whereby the Commissioner of Income Tax, Panchkula has rejected its prayer for stay of demand raised in pursuance to a notice dated 20.12.2005 (Annexure P.2) issued under Section 156 of the Income Tax Act, 1961 (for brevity 'the Act'). A further prayer for quashing the recovery notice dated 5.2.2007(Annexure P.1 Colly.) issued by the Income Tax Officer for recovery of outstanding amount of Rs.3,52,01,284/- has also been made.

Facts in brief are that the respondent department noticed that the pay scales of the employees working in the HMT were revised in pursuance to a notification issued by the Government of India w.e.f. 1.1.1992. Arrears of salary were paid to employees in instalments between 1994-95 to 1997-98. The petitioner did not deposit any TDS in the Government account which was shown to have been deducted from the payments made to the employees. During investigation it was noticed that

the petitioner company has paid Rs. 1,03,48,422/- during the year 1994-95 to its workers on account of pay revision w.e.f. 1.1.1992 to 30.9.1995. As no TDS on the above payment of salary arrears was deducted and deposited, various notices were issued to the petitioner company. It has been found that as on 31.3.2003 a sum of Rs., 8,63,40,683/- is appearing in trial balance under the head interim relief to workmen. The stand of the petitioner company before the ITO cum TDS Panchkula was that the employees have not been paid any arrears of salary but only interim relief in the form of adhoc recoverable advance has been paid and as such the provisions of Section 201 (1A) of the Act would not be attracted. The ITO cum TDS Panchkula still considered that the adhoc recoverable advance which has been paid to the employees against the final settlement of arrears of pay has to be regarded as a part of wage/ salary of the employees. It has also been found that as a special arrangement the advance has been paid to the employees which is subject to adjustment towards the final entitled amount of wage/salary. Rejecting the argument that the provisions of Section 201 (1) of the Act would not be attracted the ITO cum TDS Panchkula placed reliance on the provisions of Section 17(1)(V) of the Act to conclude that the salary includes any advance of salary, or arrears. It further opined that arrears have also been held to be part of salary and are subject to deduction of TDS. It has also been held that there is no comparison of such an advance with loans like car advance etc. which do not constitute a part of salary and with the adhoc recoverable advance to be adjusted against the final settlement of salary. The ITO cum TDS in the concluding para of its order held as under:

“ Accordingly, I hold the assessee in default u/s 201(1) for not

deducting the TDS on Advance salary arrears u/s 192 of I.T.Act. As far as interest u/s 201(1A) is concerned, the Hon'ble High Court of Kerala in 109 Taxman 395 has observed that the levy of interest u/s 201(1A) is compensatory measure for withholding tax which ought to have gone to the exchequer. Provisions makes it clear that levy of interest is mandatory.

In view of above liability of tax u/s 201(1) including intt.

U/s 201(1A) is computed as under.

Payment made to workers as salary as discussed above.	1,03,48,422/-
TDS liability at average rate of 20%	20,69,684/-
Intt. U/s 201(1A)	<u>26,69,884/-</u>
Total	<u>47,39,568/-"</u>

In pursuance to the afore-mentioned order, demand has been raised by issuance of notice of demand under Section 156 of the Act.

The petitioner-company prayed for grant of stay of demand before the Assessing Officer and the Commissioner of Income Tax vide various applications dated 30.1.2006, 4.2.2006, 28.4.2006, 1.9.2006, 14.9.2006 and 7.11.2006 (Annexure P.4 colly.) The application with regard to interim relief was rejected vide order dated 20.11.2006 (Annexure P.1). Side by side, the petitioner challenged the order dated 20.12.2005 (Annexure P.3) before the Commissioner of Income Tax (Appeals). The appeal was dismissed vide order dated 28.2.2006. Against the order passed by the CIT(Appeals), the assessee filed an appeal before the Income Tax Appellate Tribunal (for brevity 'the Tribunal'). It is admitted position that

the appeal is still pending.

It is also conceded that the Committee of Disputes (COD) has considered the matter in pursuance to two judgements of Hon'ble the Supreme Court in the cases of Oil and Natural Gas Commission v. Collector of Central Excise 1992 (suppl.II) SCC 432 and Oil and Natural Gas Commissioner v. Collector of Central Excise (1994)6 SCC 437. The minutes of the meeting dated 29.3.2007 have been placed on record as Annexure P.10. In respect of the case of the petitioner it has been decided by the COD that the petitioner may pursue its remedy of appeal before the Tribunal in view of the questions of facts and law involved in the matter under dispute.

When the matter came up for consideration before this Court on 15.2.2007 while issuing notice of motion recovery was stayed. On the basis of the afore-mentioned interim order passed by this Court, the Tribunal did not decide the application for stay filed alongwith the appeal on merits. However, it disposed of the application for stay of recovery by placing reliance on the interim order passed by this Court. The order dated 5.3.2007 passed by the Tribunal (Annexure P.11) reads as under:

“ By means of the captioned applications, the assessee has prayed for stay of the disputed demand. However, in the meantime, the applicant has approached the Hon'ble Punjab and Haryana High Court and interim stay for the recovery of the disputed demand has already been granted by the Hon'ble High Court. We, therefore, find these applications as infructuous and the same are accordingly filed.

We hardly need to mention that the order of the Hon'ble

High Court is operative. As the prayer made by the applicant assessee has already been granted by the Hon'ble High Court, the stay applications have become infructuous.

In the result, the stay applications are dismissed as infructuous.

Order pronounced in open Court on 2.3.2007.”

We have heard learned counsel at a considerable length. It is admitted position that appeal of the petitioner is pending before the Tribunal and the application for granting stay has been disposed of simply by following the interim directions issued by this Court. It is also undisputed that the COD has granted permission to the petitioner to pursue its remedy of appeal before the Tribunal. The factum of grant of permission by the COD could not be considered by the Tribunal when it passed orders on 5.3.2007 because the meeting of the COD could be held later i.e. on 13.3.2007 and the minutes were conveyed on 29.3.2007. Therefore, it would be just and proper to set aside the order dated 5.3.2007 (Annexure P.11) passed by the Tribunal as the Tribunal had not applied its independent mind. It also could not take into account the views expressed by the COD.

In view of the above, this petition is allowed. The order dated 5.3.2007 (Annexure P.11) passed by the Tribunal is set aside with a direction to the Tribunal to consider the application filed by the petitioner for interim directions afresh by taking into consideration all subsequent developments including the permission of the COD to pursue the appeal before the Tribunal. We make it clear that any observation made in this order shall not be considered as an expression of opinion on the merits of the case and the Tribunal shall not be influenced by the fact that this Court

had at one stage granted the interim stay. However, we permit the petitioner to approach the Tribunal within one week and no coercive steps be taken till one week i.e. upto 16.10.2007.

Copy of the order be given dasti on payment of usual charges.

(M.M.Kumar)
Judge

8.10.2007
okg

(Ajay Kumar Mittal)
Judge